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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Marco Crane & Rigging Company,

10 Plaintiff,

11 v.

12 Greenfield Products, LLC,

13 Defendant.
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No. CV-17-01836-PHX-GMS

ORDER

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16 Pending before the Court is Defendant Greenfield Products, LLC's ("Defendant")
17 Motion for a New Trial. (Doc. 233.) For the following reasons, the Motion is denied.

18 **BACKGROUND**

19 From October 19–23, 2020, this Court held a jury trial on Plaintiff Marco Crane &
20 Rigging Company's ("Plaintiff") product liability and breach of implied warranty claims
21 against Defendant. The jury found in favor of Plaintiff on both claims. On the product
22 liability claim, the jury found Plaintiff 43% at fault and Defendant 57% at fault.

23 Prior to trial, Defendant filed several motions in limine, including a motion to
24 exclude evidence of other incidents, (Doc. 137), and a motion to exclude evidence of
25 subsequent remedial measures, (Doc. 140). In an Order setting trial, the Court denied both
26 motions without prejudice. (Doc. 158.)

27 In response to Plaintiff's memorandum on evidentiary matters that Plaintiff wished
28 to bring up during opening argument, Defendant renewed its request that the Court

1 preclude evidence of other incidents and subsequent remedial measures. (Doc. 168.) The
 2 Court ordered that Plaintiff could “reference subsequent accidents with Defendant[’s]
 3 product and corresponding remedial measures during opening argument to the extent it
 4 ha[d] admissible evidence of such accidents and remedial measures.” (Doc. 171 at 1.)

5 Defendant now moves for a new trial, asserting that the Court’s admission of
 6 Plaintiff’s evidence concerning other incidents and subsequent remedial measures was
 7 improper. (Doc. 233.)

8 DISCUSSION

9 I. Legal Standard

10 Under Federal Rule of Civil Procedure 59, a court may grant a new trial to any party
 11 “for any reason for which a new trial has heretofore been granted in an action at law in
 12 federal court.” As “Rule 59 does not specify the grounds on which a motion for a new trial
 13 may be granted,” courts are “bound by those grounds that have been historically
 14 recognized.” *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003).
 15 Granting a new trial is “confided almost entirely to the exercise of discretion on the part of
 16 the trial court.” *Allied Chem. Corp. & Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

17 A motion for a new trial “may raise questions of law arising out of alleged
 18 substantial errors in admission or rejection of evidence” by the court. *Montgomery Ward*
 19 *& Co., v. Duncan*, 311 U.S. 243, 251 (1940). To reverse a jury verdict for evidentiary
 20 error, the court must have “abused its discretion in a manner that prejudiced the appealing
 21 party.” *United States v. 4.85 Acres of Land*, 546 F.3d 613, 617 (9th Cir. 2008). The Ninth
 22 Circuit has held that a court abuses its discretion when
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24 it makes an error of law, when it rests its decision on clearly erroneous
 25 findings of fact, or when we are left with a definite and firm conviction that
 26 the district court committed a clear error of judgment.

27 *Id.* (internal quotations and citation omitted). A court’s evidentiary ruling is prejudicial
 28 “only if the verdict was more probably than not tainted by error.” *Theme Promotions, Inc.*

1 *v. News Am. Mktg. FSI*, 546 F.3d 991, 1005 (9th Cir. 2008).¹

2 **II. Analysis**

3 **A. Subsequent Remedial Measures**

4 Plaintiff is the owner of a Link Belt mobile crane. At the time of the subject
 5 accident, Plaintiff's employee was operating the Link Belt mobile crane with Defendant's
 6 W3-283 boom dolly, which provided support for the crane during transport. Marco Crane's
 7 boom dolly had a pivot. (Doc. 245 at 108.) At trial, Plaintiff elicited testimony about
 8 modifications made to other boom dollies made by Defendant after the subject accident.
 9 Specifically, after an accident involving a Bigge Crane, Defendant designed a rigid
 10 attachment for Bigge that would limit the amount of pivot on the boom dolly's towers. *Id.*
 11 at 108–09. Defendant contends that admission of this evidence violated Federal Rule of
 12 Evidence 407. That rule provides:

13 When measures are taken that would have made an earlier injury or harm less
 14 likely to occur, evidence of the subsequent measures is not admissible to
 15 prove:

- 16 • negligence;
- 17 • culpable conduct;
- 18 • a defect in a product or its design; or
- 19 • a need for a warning or instruction.

20 But the court may admit this evidence for another purpose, such as
 impeachment or—if disputed—proving ownership, control, or the feasibility
 of precautionary measures.

21 Fed. R. Evid. 407.

22 The Court did not abuse its discretion in allowing this evidence. At trial, Defendant
 23 took the position that the boom dolly involved in the subject accident was a unique and
 24 custom dolly. Defendant's expert, Gustavo Anzola, for instance, testified that the design
 25 change for Bigge was "completely different to the fix that would be on the Link-Belt."

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 27 ¹ The parties dispute whether Defendant properly preserved its right to raise these
 28 evidentiary issues in its motion for a new trial and, consequently, whether a plain error
 standard applies. As the Court finds that Defendant fails to meet the standard referenced
 above, it is not necessary to determine whether a stricter standard applies.

1 (Doc. 245 at 154.) Given Defendant's position on the differences between boom dollies, a
2 reasonable jury could find that fixes to other dollies would not have made the subject
3 accident less likely to occur. That Mr. Anzola testified that the design change to the other
4 dollies was intended to reduce the likelihood of rollovers does not alter this analysis. *Id.*
5 at 154–55. Accordingly, as a reasonable jury could conclude that this evidence does not
6 qualify as a subsequent remedial measure, admission of the evidence did not violate Rule
7 407. Furthermore, as is the case with the other accidents discussed below, this evidence
8 was relevant for impeachment purposes because Defendant's witnesses testified that Marco
9 Crane's boom dolly was not defective. *See, e.g.*, (Doc. 246 at 338.)

10 **B. Other Accidents**

11 The Court also did not abuse its discretion in admitting evidence of other accidents
12 involving Defendant's boom dollies, including subsequent accidents. When a plaintiff
13 seeks to introduce evidence of other accidents as direct proof of negligence, a design defect,
14 or notice of the defect, a showing of substantial similarity is required. *Cooper v. Firestone*
15 *Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). However, "*Cooper* is clear that
16 other [accidents] need to be substantially similar only when the plaintiff is using evidence
17 relating to them as '*direct* proof of negligence, a design defect, or notice of the defect.'"
18 *Benson Tower Condo. Owners Assoc. v. Victaulic Co.*, 702 Fed. App'x 537, 541 (9th Cir.
19 2017) (quoting *Cooper*, 945 F.2d at 1105). In *Benson*, for example, the Ninth Circuit
20 upheld the introduction of evidence of black particles in other buildings to rebut the
21 defendant's theory that the black particles in the case at issue were not from the defendant's
22 products. *Id.*

23 Here, Defendant's theory of the case was that Plaintiff's driver, Chad Wall, was the
24 cause of the subject accident, not a defect in Defendant's product. Therefore, evidence of
25 other accidents involving Defendant's product was admissible under *Cooper* to rebut this
26 theory. Contrary to Defendant's assertion, *Cooper* does not expressly limit its holding to
27 prior accidents only. Additionally, that other circuit precedent may conflict with the
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1 holding in *Cooper* does not establish that the Court abused its discretion in admitting the
2 evidence. Accordingly, Defendant's motion is denied.

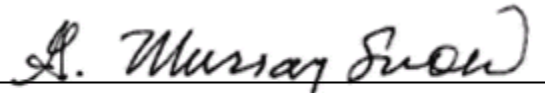
3 **CONCLUSION**

4 For the reasons provided above, the Court did not abuse its discretion in admitting
5 evidence of design changes to other boom dollies or evidence of other accidents.

6 Accordingly,

7 **IT IS THEREFORE ORDERED** that Defendant's Motion for a New Trial
8 (Doc. 233) is **DENIED**.

9 Dated this 3rd day of May, 2021.

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12 G. Murray Snow
13 Chief United States District Judge
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